

**U.S. OFFICE OF SPECIAL COUNSEL**1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505www.osc.gov

February 27, 2004

The Special Counsel

VIA FACSIMILE: (202) 225-7680

ORIGINAL BY U.S. MAIL

The Honorable John Conyers, Jr.
Ranking Democrat
Committee on the Judiciary
U.S. House of Representatives
3128 Rayburn House Office Building
Washington, DC 20515-6216

Dear Congressman Conyers:

Thank you for your letter of inquiry dated February 19, 2004, regarding our review of the Agency's legal interpretation of 5 U.S.C. § 2302(b)(1) and (b)(10). Upon taking office, I was shown a power point presentation by a member of the senior staff indicating that the office was interpreting 5 U.S.C. § 2302(b)(1) and (b)(10) as prohibiting discrimination against a federal employee on the basis of sexual orientation as a protected class. Section 2302(b)(1) of Title 5 prohibits discrimination "on the basis of race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation." Section 2302(b)(10) prohibits discrimination on the basis of "conduct which does not adversely affect the performance of the employee or applicant or the performance of others...."

The slide presentation was not clear on the policy of this office, whether it enforced both of these provisions as prohibiting discrimination on the basis of sexual orientation, or whether the policy applied only to 5 U.S.C. § 2302(b)(10). The other literature and contents of the website referred to the same issues. While I am conducting this review and conferring with agency lawyers and my immediate staff, I have removed all materials that pertain to this issue in the event that the legal basis for conferring class or status under the statutory provision does not exist.

It appears that, beginning five years ago, this Office based jurisdiction in this area on the amendment to Executive Order 11487 made by Executive Order 13087. But Executive Order 11487, as further amended by Executive Order 13152, expressly states that it "does not confer any right or benefit enforceable in law or equity against the United States or its representatives." Further, Executive Order 11487, as amended, expressly places responsibility for its enforcement and implementation in the EEOC, not in OSC. Because of this, it is unclear whether that executive order confers any authority on this office to enforce it. I am evaluating whether "sexual orientation" is a distinct category or class under (b)(1) over which this office has jurisdiction. I will be working with staff here and consulting with OPM and EEOC, and your offices, to arrive at answers to these issues.

The Special Counsel

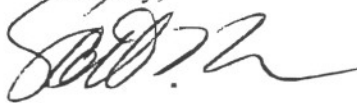
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As I stated in testimony, any employee going to a Gay Pride event (or a Pro-Life event for that matter) would have full protections under (b)(10), since attendance at such an event would likely fall within statutory parameters of conduct that does not adversely affect job performance. As I stated to the Senate Committee on Government Affairs in written answers to questions during the confirmation process, I have no difficulty whatsoever enforcing the rights of employees who have been discriminated against based on conduct under 5 U.S.C. § 2302(b)(10).

This agency and I as Special Counsel are firmly committed to protecting individual employee rights under the authority granted to me by Congress. We are reevaluating many aspects of the agency, including personnel, structure of the agency, the backlog of prohibited personnel practice cases and disclosure cases, as well as current OSC policies. I have laid down a challenge to my Agency to eliminate the backlog of disclosures, prohibited personnel practice and Hatch Act cases by year's end.

I look forward to working with you on all of these issues in order to improve the merit system and public trust in government.

Sincerely,



Scott J. Bloch

cc: The Honorable F. James Sensebrenner
The Honorable Steve Chabot
The Honorable Jerrold Nadler